Patrick W. Turner
General Attorney–South Carolina
Legal Department

AT&T South Carolina
1600 Williams Street
Suite 5200
Columbia, SC 29201

T: 803.401-2900
F: 803.254.1731
pt1285@att.com
www.att.com

April 11, 2012

The Honorable Jocelyn Boyd
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: BellSouth Telecommunications, LLC d/b/a AT&T South Carolina, Complainant/Petitioner v. Halo Wireless, Inc., Defendant/Respondent
Docket No.: 2011-304-C

Dear Ms. Boyd:

Enclosed for filing is AT&T South Carolina's Opposition to Halo's Motions to Strike Testimony of Mr. Neinast, Mr. McPhee, and Mr. Drause in the above-referenced matter.

By copy of this letter, I am serving all parties of record with a copy of this pleading as indicated on the attached Certificate of Service.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
1029582

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In Re: Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Halo Wireless, Inc. for Breach of the Parties' Interconnection Agreement	)))))	**Docket No. 2011-304-C**

AT&T SOUTH CAROLINA'S OPPOSITION TO HALO'S MOTIONS TO STRIKE TESTIMONY OF MR. NEINAST, MR. MCPHEE, AND MR. DRAUSE

In the latest of a long line of baseless attempts to prevent AT&T South Carolina from presenting its claims to this Commission for resolution, Halo has filed Motions asking the Commission to strike the entirety of the prefiled written testimony of AT&T South Carolina witnesses Mark Neinast, Scott McPhee, and Ray Drause. As explained below, Halo's Motions are utterly without merit. Accordingly, just as the Tennessee and Wisconsin Commissions overruled similar objections and denied similar motions by Halo during proceedings in those states,[1] this Commission should summarily deny each of Halo's Motions.

I. EACH OF HALO'S MOTIONS IS DEFECTIVE ON ITS FACE

Each of Halo's cookie-cutter Motions is entirely conclusory. None of them analyzes any particular aspect of the pre-filed testimony of Mr. McPhee, Mr. Neinast, or Mr. Drause, much less attempts to explain how any specific aspect of their testimony violates any rule of evidence. It is not the Commission's task to do Halo's work for it or to guess which part of the testimony

[1] Attachment A to this Response is the Wisconsin Commission's Order denying Halo's Motions to Strike. Attachment B to this Response is a copy of the pages of the transcript of the Tennessee hearing during which the Tennessee Commission overruled various Halo objections to the admissibility of similar testimony in that proceeding.

Halo's various objections are supposed to relate to.[2] The Commission, therefore, can and should deny each of Halo's Motions as facially defective.

II. EACH OF HALO'S MOTIONS IS WITHOUT MERIT

A. Neinast and McPhee.

Halo's Motions regarding Mr. Neinast's and Mr. McPhee's testimony are identical (though the testimony is not), so AT&T South Carolina will address those Motions together. Halo first contends that the testimony "states inadmissible conclusions on issues of law," but it identifies no such inadmissible conclusions. The reason is simple – there are none. At appropriate points in their testimony, Mr. Neinast and/or Mr. McPhee provide context by informing the Commission of relevant orders, contractual provisions, and similar matters that bear on the evidence they present. They also inform the Commission of AT&T South Carolina's general position regarding those matters. In doing so, they take appropriate care to leave it to AT&T South Carolina's attorneys to present the legal argument supporting those positions in briefs (in contrast to Halo's witnesses, who go on for page after page with the details of Halo's legal argument, all under the guise of "my counsel advises me that . . . .").[3] This common and useful practice of putting complex regulatory testimony in the context of applicable rules, decisions, and contractual provisions is entirely appropriate and does not render any aspect of the

---

[2] The Commission has held that if a party believes that parts of a witness' testimony should not be admitted, the party "must raise specific objections to the portions of the testimony which it claims are excludable." *See* Order, *In Re: Joint Petition for Arbitration of New South et. al.*, Order No. 2005-494 in Docket No. 2005-57-C at 4 (September 9, 2005).

[3] There are, for example, at least 33 instances in which Halo witness Mr. Wiseman explicitly states that he is expressing a view of the law on the advice of counsel. *See* Pre-Filed Rebuttal Testimony of Russ Wiseman at 6:22, 10:10, 10:13, 14:6, 14:9, 15:15; 16:15, 16:16, 17:2, 17:3, 17:8, 17:11, 17:13, 18:19, 18:20, 19:16, 19 n.13, 19 n. 15, 20:1, 20:8, 20:15, 20:17, 21 n.14, 23:22, 24 n.20, 37:16, 39 n.25, 47:17, 48:1, 48:8, 49:32, 64 n.39. Similarly, Halo-sponsored witness Mr. Johnson testifies at length regarding his view of the law as advised by counsel. *See* Pre-filed Rebuttal Testimony of Robert Johnson at 23:11-24:.22, 26:13-28:4, 28:13-29:8, 30:21-32 (footnotes 17-19), 34:19-35:3.

testimony inadmissible. *See Wisconsin Ruling* at 3 ("Commission practice supports the presentation of facts in an organized and meaningful way. Often the way to offer meaningful presentation of the facts requires a witness to describe the applicable law, as the witness perceives it, to provide the context necessary to make an informed decision.").

Halo next contends that the testimony lacks "a foundation of personal knowledge," but again fails to identify any particular statements that allegedly lack foundation. Notwithstanding this fatal defect, the Fourth Circuit Court of Appeals' recent decision in *dPi Teleconnect, LLC v. Owens*, 2011 WL 327071 (4th Cir. 2011) makes clear that Halo's contentions are without merit.[4] In that appeal of a North Carolina Commission decision, dPi attacked the testimony of AT&T North Carolina Witness Pam Tipton "as lacking 'personal knowledge of the situation.'" *dPi* at *3. The Fourth Circuit rejected the attack, explaining:

> While Ms. Tipton stated that her testimony was based in "part" on what colleagues had told her, she also said she had reviewed all twenty-four months of promotion credit claims, and "undertaken [her] own evaluation." Ms. Tipton also added that she was "very familiar with" BellSouth's discount policy "prior to learning dPi's filing of any complaints." She remarked, "[t]hat's not something I had to learn." ***That is sufficient for the [North Carolina Commission] to admit Ms. Tipton's testimony and for us to consider it now.***

Id. (emphasis added). Similarly, Mr. Neinast and Mr. McPhee make clear that their respective testimony is based both on the broad knowledge of the industry that they have developed as longtime AT&T employees and on specific knowledge they have developed from personally investigating the facts in this case. While Halo is free to appropriately cross-examination these witnesses, its attempts to prevent them from testifying at all are baseless. *See Id. See also* Attachment A at 2 (Wisconsin Commission explaining that "[T]he testimony relies on data either

---

[4] Attachment C to this Response is a copy of the Fourth Circuit's *dPi* Opinion. This Opinion is particularly instructive because any appeal of the Commission's decision in this docket will be heard first by the federal district court in South Carolina and then, if necessary, by the Fourth Circuit.

provided by the movants or gathered through standard industry practices. Each witness's education, experience and company position provide sufficient basis to rely on the offered facts and analysis.").

Finally, Halo's claim that the testimony of Mr. Neinast and Mr. McPhee "lacks foundation" for an "expert opinion" is similarly unexplained and unfounded. Halo appears to disagree with the methods and sources used in the call studies that Mr. Neinast sponsored, but such claims (which Mr. Neinast refuted in his rebuttal testimony) go at best to the weight of the testimony, not its admissibility. *See* Attachment A at 2 (Wisconsin Commission explaining that "Determination of the validity and proper weight of probative evidence occurs not on a procedural motion, but as part of the Commission's review of the entire record. An opposing party may contest the validity and weight of evidence through rebuttal and cross-examination.").

B. Drause

Halo's objections to Mr. Drause's rebuttal testimony are just as baseless. Halo again merely states conclusions, with no effort to tie its claims to any particular assertions or discussion in the testimony. Mr. Drause explained, in detail, his credentials and experience, the materials he reviewed, other information he relied on (including a personal site visit to the Halo facilities in Orangeburg, South Carolina about which he testifies), and the basis for his assertions. Halo will have the chance to cross-examine Mr. Drause on any statements it disagrees with – as it already did in the Wisconsin proceeding where very similar testimony was admitted over Halo's objections – but nothing in the law renders any of his written testimony inadmissible.

CONCLUSION

For all of these reasons, the Commission should promptly deny each of Halo's three Motions to Strike.

Respectfully submitted this 11th day of April, 2012.

BELLSOUTH TELECOMMUNICATIONS, LLC
d/b/a AT&T SOUTHEAST d/b/a AT&T SOUTH CAROLINA

Patrick W. Turner
General Attorney – AT&T South Carolina
1600 Williams Street
Suite 5200
Columbia, South Carolina 29201
(803) 401-2900

1029578

ATTACHMENT A

PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation into Practices of Halo Wireless, Inc., and Transcom Enhanced Services, Inc. 9594-TI-100

ORDER ON MOTIONS TO STRIKE

This order, pursuant to Wis. Admin. Code § PSC 2.04(1), denies the following Halo Wireless, Inc., and Transcom Enhanced Services, Inc., objections to direct prehearing testimony:

- Mark Neinast PSC REF#: 159344
- J. Scott McPhee PSC REF#: 159343
- Thomas McCabe PSC REF#: 159342
- Linda Robinson PSC REF#: 159345
- Lois L. Ihle PSC REF#: 159341

Wisconsin Rural Local Exchange Carriers, AT&T Wisconsin, and TDS Telecom Companies responded (PSC REF#: 159771, 159763 and 159759).[1] Movants replied (PSC REF#: 159877).

To conform the objections to Commission practice, this order deems each objection a Motion to Strike. On a Motion to Strike, movants carry the burden of demonstrating that the subject testimony fails to satisfy the applicable evidentiary standard as applied through Commission practice. This burden movants failed to carry.

Through separate motions, each applicable to one opposing party witness, movants make three practically identical objections. First, movants make a general objection claiming the

[1] The TDS Telecom Companies' response also requests a protective order from the movants' requests for "any data and other information underlying [the witness's testimony]" (PSC REF#: 159759 at 7). TDS correctly identifies the statement as improper and unenforceable to the extent one could consider it a discovery request.

witnesses use data in a manner not acceptable to experts in the field and, therefore, inadmissible as expert testimony.

However, this objection amounts to a misplaced critique of the validity and weight of the testimony. Determination of the validity and proper weight of probative evidence occurs not on a procedural motion, but as part of the Commission's review of the entire record. An opposing party may contest the validity and weight of evidence through rebuttal and cross-examination. This practice applies regardless of how the party attempts to label testimony.

Second, movants object to the admission of the subject testimony for lack of personal knowledge. However, the testimony relies on data either provided by the movants or gathered through standard industry practices. Each witness's education, experience and company position provide sufficient basis to rely on the offered facts and analysis. The Commission typically admits data of this nature. Therefore, sufficient foundation exists.

Moreover, to bar the admissibility of this evidence, movants assert a standard foreign to Wisconsin. Recently, the Tennessee Regulatory Authority (TRA) heard a case involving, for practical purposes, the same issues and parties.[2] Movants submitted objections to the testimony of opposing party witnesses that were practically identical to the instant motions.[3]

Tennessee administrative law recognizes the inadmissibility of hearsay in contested cases, but allows the admission of hearsay for evidence, "of the type commonly relied upon by

---

[2] *In Re: Complaint of Concord Telephone Exchange, Inc., Humphreys County Telephone Co., Tellico Telephone Company, Tennessee Telephone Company, Crockett Telephone Company, Inc., Peoples Telephone Company, West Tennessee Telephone Company, Inc., North Central Telephone Coop., Inc., and Highland Telephone Cooperative, Inc., Against Halo Wireless, LLC, Transcom Enhanced Services, Inc., and Other Affiliates for Failure to Pay Terminating Intrastate Access Charges for Traffic and Other Relief and Authority to Cease Termination of Traffic,* Tennessee Regulatory Authority, Docket No. 11-00108.

[3] *Objections to Rebuttal Testimony of Linda Robinson,* TRA, Docket No. 11-00108, January 23, 2012; *Objections to Rebuttal Testimony of Thomas McCabe,* TRA, Docket No. 11-00108, January 23, 2012; *Objections to Direct Testimony of Thomas McCabe,* TRA, Docket No. 11-00108, January 23, 2012; *Objections to Direct Testimony of Linda Robinson, TRA,* Docket No. 11-00108, January 23, 2012.

reasonably prudent men in the conduct of their affairs."[4] Movants asserted that the opposing party witness failed to meet this standard. The TRA overruled these objections.[5]

Notwithstanding the persuasive precedent of the TRA ruling, the instant motions fail on different grounds. In Wisconsin, the standard for admissibility of evidence in a contested case is far less restrictive than in Tennessee. A Wisconsin administrative agency: (1) may accept evidence outside the standards of "common law or statutory rules of evidence,"(2) "shall admit all testimony having reasonable probative value," and 3) shall exclude "immaterial, irrelevant or unduly repetitious testimony" [Wis. Stat. § 227.45(1)].

This order denies the motions because movants failed to apply the correct standard and presented no basis for excluding the subject testimony according to it. Furthermore, no such basis exists.

Finally, movants object to the alleged presence of legal conclusions in the subject testimony. The presentation of legal argument is properly reserved to briefs. However, Commission practice supports the presentation of facts in an organized and meaningful way. Often the way to offer a meaningful presentation of the facts requires a witness to describe the applicable law, as the witness perceives it, to provide the context necessary to make an informed decision. Also, the record benefits from testimony that documents a party's position on a mixed question of law and fact offered by a witness with particular expertise, background or experience with the case.

---

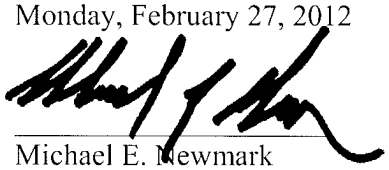
[4] In contested cases:

> (1) The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.
> TCA 4-5-313.

[5] *Transcript of Proceedings,* TRA, Docket No. 11-00108, January 23, 2012, at 7-8.

Moreover, granting the Motions on the ground that the subject testimony contains legal conclusions would call into question the validity of movants' prehearing testimony because it is riddled with the same. Instead of negating the efforts made in this proceeding to date, by excluding the bulk of the prehearing testimony, prudence and efficiency dictate the process continue to run on its course.

Monday, February 27, 2012



Michael E. Newmark
Administrative Law Judge

MEN::00462086 Order on Motions to Strike.docx

ATTACHMENT B

In The Matter Of:

In Re: BellSouth Telecommunications, LLC d/b/a AT&T TN v. Halo Wireless, Inc.

Transcript of Proceedings
January 17, 2012

---

nashville

"Quality: Your work demands it . . . Our work reflects it."

P.O. Box 290903 Nashville, TN 37229-0903

Phone: 615-885-5798
800-552-DEPO (3376)
Fax: 615-885-2621
info@ncrdepo.com

Original File F01-17-12 TRA 11-00119.txt

Q. Were those pieces of testimony prepared by you or under your direction?
A. Yes, they were.
Q. Do you have any corrections to either piece of testimony at this time?
A. No.
Q. If I were to ask you the same questions set forth in the testimony today, would you give the same answers?
A. Yes.

MR. COVEY: I move the admission of Mr. McPhee's direct and rebuttal testimony, including the exhibits, and make him available to issue his opening statements.

CHAIRMAN HILL: Without objection.

MR. THOMAS: We do have an objection.

CHAIRMAN HILL: Okay. Please make it.

MR. THOMAS: We would like to take the witness on voir dire to test the credibility of the witness and his statements in the testimony and to determine whether there's a proper foundation been laid for the testimony.

MS. PHILLIPS: If I could just briefly respond to that objection.

CHAIRMAN HILL: You may.

MS. PHILLIPS: Thank you. The practice of the Authority has been consistent with Tennessee State statute that the Rules of Evidence do not bind this Authority. As a result, we do not follow that sort of process of asking questions first to find out whether you will ask questions of a witness.

And so what we would suggest is that if counsel for Halo wants to ask the witness questions on cross, that they ask those questions on cross. If they think those questions somehow form a basis to ask the Authority not to allow this witness to testify, then they can make that argument.

But I fear that if we're going to question all the witnesses twice, once to see if we're going to question them and then to ask them their questions, we're going to be here for a longer time than is necessary.

MR. THOMAS: May I respond, Chairman?

CHAIRMAN HILL: You may.

MR. THOMAS: Regardless of the applicability of the evidence rules, there are still rules that govern whether evidence is admissible for purposes of using it as testimony for the Authority to rule on.

As the Authority itself has previously

said: (As read) Despite the leeway granted to the Authority in admitting and valuing certain evidence, the purpose of prefiled testimony, expert or otherwise, presented for the consideration of the Authority remains constant to substantially assist the Authority in understanding the evidence or determining of fact in issue in the case. (End of reading.) That was in the Chattanooga -- March 2, 2009, In Re Chattanooga proceeding.

And the point behind my voir dire is to show that none of this testimony is based on personal knowledge, none of this testimony is based upon any expert opinion. It is all essentially a reassertion of the positions taken by the legal counsel. Most of it is legal opinion, and, therefore, it does not -- it does not serve the purposes of the -- of evidence for this Authority and is objectionable.

And so we take the position -- Halo takes the position that we believe we have the right to conduct voir dire, but if we do not -- if we are not afforded that right, we object to the admission of the testimony because we believe that none of it is credible, trustworthy, reliable testimony on which the Authority may rely.

CHAIRMAN HILL: Mr. Thomas, I've heard

what you have to say, and I understand what you're saying; however, I think that you are a competent counsel for your client and in your cross-examination I believe that you can bring out the points that you need to bring out without us going through the Rules of Evidence.

MR. THOMAS: And on that point, may I -- I simply make my objection and I would only ask that you overrule it.

CHAIRMAN HILL: The objection is overruled and it is part of the record.

MR. THOMAS: Thank you.

(Prefiled testimony entered into the record.)

CHAIRMAN HILL: All right. Mr. Covey.

BY MR. COVEY:

Q. Mr. McPhee, are you ready to make your opening statement?

A. I am. Good morning. My name is Scott McPhee and I'm employed by AT&T.

I submitted testimony in this proceeding that addresses the interconnection agreement between AT&T Tennessee and Halo Wireless, as well as several ways in which Halo has breached the agreement.

In April 2010, the parties entered into the

CHAIRMAN HILL: If you would.

MR. THOMAS: Thank you, Mr. Chairman.

CROSS-EXAMINATION

BY MR. THOMAS:

Q. Good morning, Mr. McPhee. My name is Steve Thomas.

A. Good morning.

Q. I represent Halo Wireless Services -- Halo Wireless, Inc.

Would you confirm -- your testimony says that you were -- you have degrees from the University of California at Davis in economics and political science. Do you have any other degrees?

A. I do not.

Q. Are you an attorney?

A. No.

Q. Have you ever had any legal training?

A. No.

Q. Have you ever been to Halo's facilities?

A. I have not.

Q. Have you ever discussed anything with any of Halo's personnel?

A. No.

Q. Have you ever had an opportunity to directly take data of call information for Halo

calls?
A. Can you please explain what you mean by "directly take data"?
Q. By you actually putting in the instructions where you obtained the data as it came from the call stream.
A. I have not input any instructions to obtain data.
Q. Have you taken any other steps where you -- from a scientific or technical point of view conducted any study or analysis that you would use to -- on any data of Halo?
A. I'm sorry. Could you -- I guess I need to understand what you mean by "study or analysis."
Q. In any way have you conducted a scientific study or analysis of any data of Halo?
A. I have seen studies of data from Halo. I'm not sure I understand your term "scientific study," but I have looked at the studies. I have not directed the collection of the data for those studies.
Q. So all of the information that you have was provided to you by third parties; is that correct?
MR. COVEY: If I could ask for

end users --

CHAIRMAN HILL: We're going to recess for five minutes. We'll be back.

You are under oath. Don't talk while you're gone.

(Recess taken from 9:59 a.m. to 10:06 a.m.)

DIRECTOR KYLE: Thank you. I'm ready to move on.

CHAIRMAN HILL: Is everybody situated? Let me remind the witness you are still under oath. All right. You may continue.

BY MR. THOMAS:

Q. Thank you, Mr. McPhee. The point that I was trying to make is that if a court disagrees with you that it's landline-originated, then the court would trump, would it not?

A. I will leave that to the attorneys to decide. It sounds like a legal issue.

Q. Exactly. And so because this is a legal term, it's not something that you have expertise on?

A. Well, I disagree, because in my experience of 12 years of dealing with intercarrier compensation, the term is commonly used in order to describe call scenarios. So --

Q. Go ahead and finish your answer. I'm sorry.

A. So I do feel a bit -- that I have an understanding of what a landline-originated call means for purposes of my testimony and for purposes of intercarrier compensation.

Q. You have an understanding of what you understand "landline-originated" means, and all I'm trying to point out is you may not agree -- or a court may not agree with you on that and a court would trump, wouldn't it?

A. I understand that there may be a legal definition where the lawyers might have a different understanding or there might be a different definition, but, as I said, in my industry experience, I do use the term and it is commonly used.

Q. You use the term "disguising" and "manipulating" -- those two terms in that sentence that follows, didn't you?

A. I did.

Q. With that, you implied, didn't you, that Halo was intentionally trying to deceive AT&T, didn't you?

A. I don't say specifically that Halo is

intentionally doing it. I say that the traffic was disguised and the call records were manipulated.

Q. So you think that there's a possibility that someone could accidentally disguise and accidentally manipulate?

A. I don't know what the intention may be behind somebody disguising or manipulating. I'm just describing the characteristic of the traffic and the call records.

Q. So you don't have personal knowledge of anything -- you don't have personal knowledge of anything that Halo did, do you?

A. I'm sorry? In what respect?

Q. You don't have personal knowledge of anything -- any action that Halo has ever taken, do you?

A. I disagree with that.

Q. How would you have personal knowledge if you've never had any interaction with Halo or its employees?

A. I have not literally stood over anybody's shoulder at Halo and watched them do things. I do have knowledge of --

Q. Let me clarify my question. I'm sorry. It was an improper question.

"Personal knowledge" means that you saw it, you experienced it. If you don't have personal knowledge, then you're relying on something someone else told you, something that came from a document, something that came from someone telling you something. It's hearsay. It's something you've been told and so you're repeating it or you're using it to analyze without knowing what the source of that is.

So the difference between personal knowledge and the type of knowledge you're talking about -- you're not talking about personal knowledge. Do you understand that?

MS. PHILLIPS: Chairman Hill, could I just clarify for the record?

CHAIRMAN HILL: You may.

MS. PHILLIPS: AT&T is happy to stipulate that Mr. McPhee has based his testimony on things like looking at the call detail, looking at call studies, looking at communications from Halo. We are not suggesting that Mr. McPhee witnessed with his eyes call detail being input by Halo.

I hate for us to waste a lot of time on the legal, technical definition of what is personal knowledge. I think within the context of the ordinary practice of this agency, in order to not have 15

different witnesses who say, yes, I'm the one who looked at the computer screen and I pulled the call detail, and then have somebody else say I looked at the call detail and I handed it to Mr. McPhee, Mr. McPhee is describing what he understands has happened here and how that interrelates with the contract. We are not suggesting that Mr. McPhee has visited Halo.

And I don't believe Mr. McPhee has testified anything about their intent. The call study that was included in the prefiled testimony is included in someone else's prefiled testimony, and I think we might could move through this a little more quickly if we just stipulate he is a fact witness. He is not offering an expert legal conclusion. He is simply describing his understanding of the information that came from other parties and whether that is consistent with the interconnection agreement of the parties.

And I say that on the record because I just want to try to cut through some of the evidentiary sort of discussion about the competence of the witness.

CHAIRMAN HILL: And so then, if I may, you would -- forgive me if I -- I don't mean this to be a leading question, but would you agree to the fact that your witness has not -- he has not been to Halo. He hasn't talked to Halo. He hasn't had a

psychological profile done on anybody at Halo. That what he has to say should not be inferred -- there should be no inference that he has that knowledge. Is that what I'm hearing?

MS. PHILLIPS: I think those are all correct statements, in large part because our case does not allege any intent on Halo's part. We're not making a fraud claim. We're saying that they breached the contract.

So this testimony is about what they did, not what they intended, not what their motivations were. And Mr. McPhee is testifying based on his understanding of material he has reviewed from other people as opposed to interacting face-to-face with Halo, and we would contend that that is commonly accepted as reliable and proper testimony here at the Authority.

And we will not be objecting to Halo's witnesses who also rely on -- describe industry practices and rely on things that their lawyers told them, because we recognize that is the efficient way to raise these issues in this commission.

CHAIRMAN HILL: And so your witness appears as an analyst of what he has seen?

MS. PHILLIPS: He is describing what

he has seen. He has not performed any sort of expert analysis or the kinds of things that expert witnesses do. He is describing his conclusions based on other things that he has observed or learned, yes, sir.

CHAIRMAN HILL: Thank you.

MR. THOMAS: May I make two points, Your Honor?

CHAIRMAN HILL: You may.

MR. THOMAS: First of all, I apologize that I am not well experienced in dealings before the Tennessee Regulatory Authority or proceedings like this, but I have been representing clients for many years. And when someone says that my client is disguising, when they say that my client is manipulating, or on the next page when they say that my client is perpetuating a scheme, it appears to me that that is a specific statement -- an accusation that my client is engaged in unlawful conduct intentionally, and I have a right to defend my client against those accusations.

But, second, if counsel for AT&T will stipulate that Mr. McPhee has no personal knowledge of the matters on which he is testifying regarding Halo, then I think we can leave all of that -- all of these issues behind.

MS. PHILLIPS: Chairman Hill, AT&T will not stipulate that this witness does not have personal knowledge. He has a great deal of personal knowledge. He has personally evaluated the information that all folks in the telecom industry use to decide whether folks are complying with their interconnection agreements. We certainly are not going to do something in Tennessee -- the first state commission to take up these issues -- to create the ability for Halo to go around to other places, well, AT&T has agreed that their witnesses don't have any knowledge, that their witnesses aren't competent, and that is all this exercise appears to be about.

MR. THOMAS: No. You're wrong.

MS. PHILLIPS: What I would suggest is -- I hoped by raising this that we could cut to the chase and relieve Halo of feeling the obligation to create a lot of record here that they have questioned the competence of the witness. Obviously, that isn't going to make things go more quickly; it's just going to draw things out. So we would just suggest that -- I think both parties have made their point on the record and maybe we can get back to asking questions of the witness.

CHAIRMAN HILL: If I may restate then

what I heard you say, Ms. Phillips, you're not accusing fraud, you're not -- you're not exposing in any fashion something that you've discovered. All you're talking about here is whether or not there was a breach of the agreement; is that correct?

MS. PHILLIPS: We are talking about -- our claim is that there has been a breach of the agreement. Now, it certainly makes it more likely in the -- for the fact finder to determine that a breach occurred when we explain what the motivation might have been for doing those things. We do believe that the reasons that Halo has made -- has inserted call detail that isn't normally inserted is for the purpose of making their traffic look like something it isn't.

We are not making a fraud claim, though. We don't have to prove what was in their heart. And all I'm suggesting is that, you know, the word "disguise" means make something look like something else, and that's what I think the witness means. And "manipulate" means, you know, change something. That is what I think has happened. "Scheme" -- I'm sorry if that word feels a little unpleasant, but "scheme," you know, means a design, a plan, a purpose to do something.

And we do believe that they have

engaged in this purposefully to pay a lower rate than is required by the contract, but all of those claims relate to breach of contract. And I do not want to concede that we are obligated to prove that they had some evil intent, because breach of contract claims don't require that.

CHAIRMAN HILL: So what you're trying to -- what I'm trying to hear here -- I think you're trying to tell me is that these words are used without prejudice and are not necessarily malevolent in their usage?

MS. PHILLIPS: Absolutely.

CHAIRMAN HILL: What I'm -- I mean, I can understand -- I mean, you know, there's a famous lawyer named Shylock, so we understand that that set a precedent for certain views of attorneys. And so words are powerful, but I'm understanding, for the record, that you're telling me that this is not used with any prejudice, these words are not?

MS. PHILLIPS: They are not intended to offend.

CHAIRMAN HILL: However, apparently, they do offend.

MR. THOMAS: Chairman, if I might respond. Page 4, line 15 of Mr. Neinast's testimony

comes straight out and says that this is an attempt to defraud by Halo. This is evidence -- they are asking that you admit this information as evidence. We are objecting to that evidence in cross-examining to show they don't have any basis for these claims of fraud or scheme or manipulation or disguising.

Second, there are only two types of witnesses in any kind of proceeding you want to put together in this country, and that is a fact witness or an expert witness. AT&T has said he is a fact witness. Under Tennessee law, he cannot testify unless he has personal knowledge. We have the right to object to his testimony being admitted because he has no personal knowledge of any of the facts that he has put into his testimony. They are all of the type of facts that would be presented by an expert witness.

It has been right here on the record said by AT&T he is not an expert witness. He is a fact witness. Absolutely none of this testimony can come in for that reason, and we object to its admission.

MS. PHILLIPS: Chairman Hill, we don't agree that personal knowledge for purposes of admitting evidence at the Tennessee Regulatory Authority has the meaning that was just described. This testimony is based on this witness's industry understanding, his

actual experience, his actual evaluation of what has happened.

I'm sorry. I just disagree with what's being described. This is a perfectly competent witness of the same nature that this agency routinely relies upon in cases of this nature.

CHAIRMAN HILL: Well, the objection is noted, but it's my opinion that the witness has the right to make his statements. You also have the right to question them, Counsel, and I understand that. And so let's proceed, shall we?

MR. THOMAS: Your Honor, I have made an objection to the admission of his evidence based on the admission by AT&T that he is not an expert, that he is a fact witness. I presented that objection to the Authority. It sounds to me as though you have just overruled my objection.

CHAIRMAN HILL: I have overruled your objection, but I have noted it.

MR. THOMAS: Thank you. Thank you. In light of you overruling that objection and in order to preserve time, I will -- I will say that in the interest of time, we will take up issues where the two witnesses overlap through cross-examination of Mr. Neinast and I will conclude my cross-examination.

Q. Was that testimony prepared by you or under your direction?
A. Yes, it was.
Q. Do you have any corrections to the testimony at this time?
A. No, I don't.
Q. Does your testimony include a corrected version of, I believe it was, Exhibit MN-3 with your direct testimony?
A. Yes, it was. I had a label correction that I needed to make.
Q. If I were to ask you the same questions set forth in your direct and rebuttal testimony today, would you give the same answers?
A. Yes, I would.

MR. COVEY: Your Honor, I would move the admission of the testimony of Mr. Neinast and make him available to issue his opening statement.

CHAIRMAN HILL: Without an objection.

MR. MCCOLLOUGH: There is an objection. I suspect it is going to sound very much like what counsel before me did with Mr. McPhee. We do, for the record, request an opportunity to take voir dire to test the basis for this witness's opinions.

I would characterize much of this

testimony not only as legal in nature, but also as an expert who is expressing opinions, who has conducted a study. And before testimony on his study results can be admitted, we have a right, under the law which has been adopted in this state, to test its reliability.

This is in the nature of a Daubert test. Before expert opinions using studies of this type can be admitted into evidence, there must be a finding that it is of a reliable nature and was performed using proper scientific or other analytical methods. I wish to conduct some voir dire to get into that before this is admitted.

CHAIRMAN HILL: Counsel?

MS. PHILLIPS: Thank you, Chairman Hill. AT&T disagrees that that is a proper characterization of this witness's testimony. This witness is offering fact evidence. This witness did not do any DNA testing. Okay? We are not talking about somebody who has performed scientific experiments.

The data that Mr. Neinast is going to talk about, what is called in his testimony "a call study" is basically this, we looked -- AT&T collected a list of all the telephone calls that Halo sent during a week. We didn't use logarithms or mathematical

analysis is silly and not at all consistent with the way this commission treats evidence of this nature. So we disagree, obviously.

MR. MCCOLLOUGH: If I may respond. I promise to be really quick. In essence, what Mr. Neinast is bringing to you is some kind of forensics analysis. He studied information, picked a certain period, looked at the information from that period, and formed conclusions and an opinion which he is presenting to you. One specific instance is his estimate that 74 percent of the traffic is landline-originated. Now, in order to calculate that percent, he had to perform an analysis and a study. I'm sorry. Where I come from, that's an expert opinion.

CHAIRMAN HILL: You are from Texas, aren't you?

MR. MCCOLLOUGH: I am indeed, and in Texas we pronounce it VORE-DIRE, not VWA-DEER. I don't want to waste a bunch of time here, because I suspect I know what the ruling is. We do request the opportunity for voir dire, and you're either going to give it to me or you're not.

CHAIRMAN HILL: Voir dire or garde or whatever you want to call it, no, we're not going to

give it to you.

MR. MCCOLLOUGH: Thank you.

CHAIRMAN HILL: We're going to operate as we normally do within the TRA function, and I don't think it rises to that issue at this point.

(Prefiled testimony moved into the record.)

CHAIRMAN HILL: All right. Continue.

MR. COVEY: Thank you.

BY MR. COVEY:

Q. Mr. Neinast, have you prepared a summary of your testimony that you would like to present at this time?

A. Yes, I have.

Q. Thank you.

A. Good morning. I'm Mark Neinast, associate director of network regulatory. I have over 36 years with AT&T, primarily in the network organization. I'm here to discuss the network and technical facts in this case.

Halo has entered into a wireless interconnection agreement with AT&T here in Tennessee. Halo's ICA clearly prohibits from sending AT&T landline traffic. I discuss in my testimony how Halo has actually been sending landline traffic to AT&T in

going to -- I'm not here to testify about that.
Q. So you don't know --
A. No.
Q. -- that, for example, if we assume that this Bandwidth.com number that was in your list -- that this particular call actually touched Bandwidth.com's network when it was originated?
A. I'm not here to represent that. I'm here to represent the fact that they're listed in the LERG, local exchange routing guide, as a landline carrier, and that's what they're listed as and that's the way we treat them. That's the industry practice today.
Q. Your study, however, would have assumed that it did indeed originate on Bandwidth.com's network?
A. If they list themselves as a landline carrier, Bandwidth.com, then that's how we're going to treat them, and that's the industry practice that's being used today by all local exchange carriers.
MR. MCCOLLOUGH: I'm going to rise just to make a record. I move to exclude his testimony because his study is unreliable. He used the calling and called number and then derived from that the

inference or assumption that merely because an originating number was signaled, that it originated on the carrier's network that holds that number and that it is the type of call that is denoted in the LERG, i.e., wireline or wireless.

I have demonstrated in this room today that that is not a valid assumption. That renders his study invalid, without basis, and inadmissible. I move to strike.

MS. PHILLIPS: Obviously, AT&T opposes the motion to strike. Mr. McCollough can make his argument about his view of how reliable our process was, but it's been explained here, and I think the Authority can weigh that as the Authority thinks is appropriate. But it certainly doesn't go to the admissibility of this evidence. This evidence has been explained. It is of the type and character that we routinely rely on in this commission to talk about what happened with a bunch of telephone calls.

CHAIRMAN HILL: One question of the witness. The study that you did and the way that it was done, getting the information and all that, and the results that you had from the study, is that industry standard -- and I don't mean AT&T only, but industry standard to do the study the way you did it and to come

a lot of things I've got questions about, but we're not here to talk about those things today.

I overrule your objection, but well stated, nonetheless. Anything else?

MR. MCCOLLOUGH: Yes, sir.

BY MR. MCCOLLOUGH:

Q. You said today -- you said in your rebuttal testimony, page 6, 11 -- lines 11 through 12, that the industry treats IP-originated traffic as wireline. May I take from that then that your analysis would have included all IP-originated calls and characterized them as wireline-originated?

A. Yes.

Q. Okay. Now, AT&T has an affiliate, AT&T Wireless; correct?

A. Yes.

Q. And AT&T Wireless is building a next-generation wireless network. It's 4G LTE; right?

A. Yes.

Q. That's an IP-based network, isn't it?

A. Yes, it is.

Q. And, in fact, the voice piece of it runs on the data side. They actually have a session initiation protocol-type application baked into the

MS. PHILLIPS: Put it in as an exhibit. He can't testify about it.

CHAIRMAN HILL: Without objection, Exhibit 10 will be in the record.

(Marked Exhibit 10.)

MR. MCCOLLOUGH: That concludes my cross-examination.

CHAIRMAN HILL: We are going to take a 5-minute break or so and let everybody get a little refreshed and then come back and we'll hit the next side. The witness is excused. Thank you very much.

(Recess taken from 3:08 p.m. to 3:19 p.m.)

CHAIRMAN HILL: We're back in session again. Ms. Phillips, did you have any redirect?

MS. PHILLIPS: No, sir, we don't.

CHAIRMAN HILL: And you wanted to move the testimony of Mr. Neinast into the record; is that correct?

MS. PHILLIPS: I believe we moved it earlier and there was an objection, and we just weren't absolutely sure, even though the objection was overruled, that it actually got accepted into the record.

CHAIRMAN HILL: It's moved into the

record, without objection.

MS. PHILLIPS: Thank you.

(Prefiled testimony entered into record.)

CHAIRMAN HILL: And there's no direct from you?

MS. PHILLIPS: No.

CHAIRMAN HILL: Do the directors have any questions for the witness, if we do, we'll call him back to the stand?

DIRECTOR FREEMAN: No.

CHAIRMAN HILL: Do the staff members have any questions?

MS. STONE: No.

CHAIRMAN HILL: You get off easy. I don't know if that's true or not, but at least you don't have to answer any more questions. How's that?

Mr. Thomas, are you the lead on this one?

MR. THOMAS: No, Your Honor. I just wanted to clarify that we did object to the entry of the testimony, and you have overruled our objection?

CHAIRMAN HILL: That's the way it worked. All right. Well --

MR. THOMAS: Thank you.

ATTACHMENT C

413 Fed.Appx. 641, 2011 WL 327071 (C.A.4 (N.C.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 413 Fed.Appx. 641, 2011 WL 327071 (C.A.4 (N.C.)))

H
This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)

United States Court of Appeals,
Fourth Circuit.
DPI TELECONNECT LLC, Plaintiff—Appellant,
v.
Robert V. OWENS, Jr.; Sam J. Ervin, IV; Lorinzo L. Joyner; James Y. Kerr, II; Howard N. Lee; William T. Culpepper, III; Edward S. Finley, Jr., Chairman, in their official capacities as Commissioners of the North Carolina Utilities Commission; BellSouth Telecommunications, Incorporated, Defendants—Appellees,
and
Jo Anne Sanford; Robert E. Kroger, Defendants.
dPi Teleconnect LLC, Plaintiff—Appellant,
v.
Robert V. Owens, Jr.; Sam J. Ervin, IV; Lorinzo L. Joyner; James Y. Kerr, II; Howard N. Lee; William T. Culpepper, III; Edward S. Finley, Jr., Chairman, in their official capacities as Commissioners of the North Carolina Utilities Commission; BellSouth Telecommunications, Incorporated, Defendants—Appellees,
and
Jo Anne Sanford; Robert E. Kroger, Defendants.

Nos. 07–2066, 09–1617.
Argued: Oct. 28, 2010.
Decided: Feb. 3, 2011.

Background: Competitive local exchange carrier (CLEC) brought suit seeking declaratory and injunctive relief from an order of the North Carolina Utilities Commission (NCUC) denying the CLEC's claim for promotional credits from an incumbent local exchange carrier (ILEC). The United States District Court for the Eastern District of North Carolina, James C. Dever III, J., 2007 WL 2818556, granted summary judgment against the CLEC, and it appealed.

Holding: The Court of Appeals, Gregory, Circuit Judge, held that record supported NCUC's interpretation of an interconnection agreement (ICA), under which the CLEC was not entitled to promotional credits from the ILEC.

Affirmed.

West Headnotes

[1] Telecommunications 372 ⚿870(1)

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k870 Proceedings
372k870(1) k. In general. Most Cited Cases

Record supported North Carolina Utilities Commission's (NCUC) interpretation of an interconnection agreement (ICA), under which a competitive local exchange carrier (CLEC) was not entitled to promotional credits from an incumbent local exchange carrier (ILEC) because the ILEC's own end users would not have been entitled to the sorts of promotions for which the CLEC applied; the ILEC's director of regulatory organization testified without contradiction that the ILEC did not count 'blocks' as features, since "[i]t really doesn't make any sense for [ILEC] to develop a promotion to entice customers to buy additional service when the enticement only applies to something that's already free." Telecommunications Act of 1996, § 101 et seq., 47 U.S.C.A. § 251 et seq.

[2] Federal Courts 170B ⚿915

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)7 Waiver of Error in Appellate Court
170Bk915 k. In general. Most Cited Cases

413 Fed.Appx. 641, 2011 WL 327071 (C.A.4 (N.C.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 413 Fed.Appx. 641, 2011 WL 327071 (C.A.4 (N.C.)))

Appellant waived claim that district court erred in denying its motion for relief from judgment by failing to argue the issue; appellant mentioned issue only once in its opening brief, in its statement of facts, and did not raise the issue at all in its reply brief, and at no point offered any argument as to why the district court erred in denying the motion. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

***642** Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:06–cv–00463–D).**ARGUED:** Anton Christopher Malish, Malish & Cowan, LLP, Austin, Texas, for Appellant. Matthew Patrick McGuire, Alston & Bird, LLP, Raleigh, North Carolina; Karen Elizabeth Long, Carrboro, North Carolina, for Appellees. **ON BRIEF:** David S. Wisz, Bailey & Dixon, LLP, Raleigh, North Carolina, for Appellant. Roy Cooper, North Carolina Attorney General, Raleigh, North Carolina, for Appellees Utilities Commissioners. Anitra Goodman Royster, Alston & Bird, LLP, Raleigh, North Carolina, for Appellee BellSouth Telecommunications, Incorporated.

Before NIEMEYER and GREGORY, Circuit Judges, and DAMON J. KEITH, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Affirmed by unpublished opinion. Judge GREGORY wrote the opinion, in which Judge NIEMEYER and Senior Judge KEITH joined.
Unpublished opinions are not binding precedent in this circuit.
GREGORY, Circuit Judge:

**1 This case involves a dispute over promotional credits between dPi Teleconnect LLC ("dPi") and BellSouth Telecommunications, Inc. ("BellSouth"). The North Carolina Utilities Commission ("NCUC") dismissed dPi's complaint and motion for reconsideration, and the district court granted the NCUC's and BellSouth's motions for summary judgment. We affirm the district court because there is substantial support in the record that dPi was not entitled to promotional credits.

I.

The Telecommunications Act of 1996 ("the Act") regulates Incumbent LECs ("ILECs") and Competitive LECs ("CLECs"). 47 U.S.C. § 251 et seq. The Act was "designed to enable new Local Exchange Carriers [ ] to enter local telephone markets with ease and to reduce monopoly control of these markets and increase competition among providers." *Verizon Md. v. Core Communications,* 405 Fed.Appx. 706, 707 (4th Cir.2010) (citations omitted) (unpublished). The Act requires, in pertinent part, that ILECs "offer for resale at wholesale rates any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4). ILECs' resale obligations extend to promotional offers which last for more than 90 days. 47 C.F.R. § 51.613.

The Act employs InterConnection Agreements ("ICAs" or "the agreement") as its primary enforcement vehicle. *Verizon Md., Inc. v. Global NAPS,* 377 F.3d ***643** 355, 364 (4th Cir.2004). "When an agreement ... is submitted to the state commission for approval, the commission may reject it only if it discriminates against a carrier not a party, or it is not consistent with 'the public interest, convenience, and necessity.' " *Id.* And "[o]nce the agreement is approved, the 1996 Act requires the parties to abide by its terms." *Id.*

Here, BellSouth and dPi functioned as ILEC and CLEC, respectively, and entered into an ICA so dPi could resell retail telephone services on a prepaid basis. The ICA stated, in pertinent part, "[w]here available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly." From January 2004 through November 2005, BellSouth offered a promotion known as the Line Connection Charge Waiver ("LCCW"). The promotion read as follows:

Planned Promotion

The Line Connection Charge Waiver promotion is extended to December 26, 2005. Services included in this promotion are:

- BellSouth® Complete Choice® plan
- BellSouth® PreferredPack [SM] plan
- BellSouth® basic service and two (2) customer

413 Fed.Appx. 641, 2011 WL 327071 (C.A.4 (N.C.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 413 Fed.Appx. 641, 2011 WL 327071 (C.A.4 (N.C.)))

calling (or Touchstar® service) local features

Promotion Specifics

Specific features of this promotion are as follows: Waived line connection charge to reacquisition or winover residential customers who currently are not using BellSouth for local service and who purchase BellSouth® Complete Choice® service, BellSouth® PreferredPack [SM] service, or basic service and two (2) features will be waived.

Restrictions/Eligibility Requirements:

****2** ...

The customer must switch their local service to BellSouth and purchase any one of the following: BellSouth® Complete Choice® plan, BellSouth® PreferredPack [SM] plan, or BellSouth® basic service and two (2) custom calling (or Touchstar® service) local features.

BellSouth's North Carolina General Subscriber Service Tariff ("the Tariff") further describes "Touchstar® service [a]s a group of central office call management features offered in addition to basic telephone services." The Tariff defines "features" to include twelve functionalities: (1) call return; (2) repeat dialing; (3) call tracing; (4) call selector; (5) preferred call forwarding; (6) call block; (7) basic caller ID; (8) deluxe caller ID; (9) anonymous call rejection; (10) calling name/number delivery blocking—per line; (11) calling name/number delivery blocking—per call; and (12) busy connect. In another section on rates, the Tariff describes "denial of per use" call return and call tracing, refers to them as "features" in a footnote, and lists their respective Universal Service Order Codes (USOCs).

dPi proceeded to purchase basic service from BellSouth and instructed BellSouth to block certain features ("blocks") that customers could use on a charge-per-use basis. dPi did so because it sold pre-paid phone services to customers who were not creditworthy, and it might have trouble recouping payment for bills after the fact for charge-per-use features. dPi specifically asked BellSouth to block call return (known by its USOC, "BCR"), repeat dialing ("BRD"), and call tracing ("HBG"), and BellSouth agreed. dPi resold the basic service and 'blocks' to customers as a single pre-paid package.

dPi then applied to BellSouth for promotional credits under the LCCW. BellSouth denied the applications because dPi's customers had not purchased basic service and two or more features other than 'blocks.' Next, dPi filed a complaint ***644** before the NCUC, alleging it was entitled to promotional credits. Before the NCUC, BellSouth's director of regulatory organization, Ms. Pam Tipton, testified that only paid features qualify for LCCW and that 'blocks' are not eligible for such credits. The NCUC decided that they were "not required to analyze and decide this case based on the language of the promotion" because "BellSouth and dPi jointly agreed [that] ... 'promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly.' " Instead, the NCUC found Ms. Tipton's testimony was "dispositive" and "uncontested by dPi at the hearing and unrebutted in its post hearing brief."

The NCUC dismissed dPi's complaint, reasoning that "[u]nder the clear terms of the interconnection agreement and the facts of this case, dPi end users who only order blocking features are *not* eligible for the credits because similarly situated BellSouth End Users are not entitled to such credits." The NCUC declined to construe any potentially ambiguous provisions against the drafter (BellSouth) because dPi voluntarily agreed to more specific terms in the ICA. While the NCUC acknowledged problems in BellSouth's overall system for requesting promotion credits, it suggested another type of proceeding would be a more appropriate forum for resolving them. dPi moved for reconsideration, which the NCUC denied.

****3** dPi next filed a complaint in district court seeking declaratory and injunctive relief from the NCUC's order denying its claims. The court stressed the binding legal effect of the parties' ICA and concluded that there was substantial evidence supporting the NCUC's interpretation of the ICA, given Ms. Tipton's testimony and the clear terms of the ICA. The district court granted BellSouth and NCUC's motions for summary judgment, and dPi appealed to our Court.

Then, dPi motioned the NCUC to reconsider once more in light of new evidence about Ms. Tipton's credibility and data about BellSouth's use of waivers

413 Fed.Appx. 641, 2011 WL 327071 (C.A.4 (N.C.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 413 Fed.Appx. 641, 2011 WL 327071 (C.A.4 (N.C.)))

in Florida. The NCUC denied the motion, finding that dPi's arguments were "mere conjecture" and that the "record is insufficient to prove by the greater weight of the evidence that BellSouth granted *any,* let alone a significant amount of, LCCW promotion waivers to the customers in question or to prove that ... Tipton provided evidence 'now known to be false.' " Next, dPi filed a motion pursuant to Fed.R.Civ.P. 60(b) before the district court, and meanwhile our Court held dPi's original appeal in abeyance. The district court denied that motion, "[i]n light of the NCUC's findings and the requirements of Rule 60(b) ...." dPi again appealed to our Court, and we consolidated its two appeals.

II.

[1] While we review de novo the NCUC's interpretation of the Act, we do not "sit as a super public utilities commission," and are "not free to substitute [our] judgment for the agency's...." *GTE South, Inc., v. Morrison,* 199 F.3d 733, 745–46 (4th Cir.1999) (citations omitted). Instead, we "must uphold a decision that has substantial support in the record as a whole even if [we] might have decided differently as an original matter." *Id.* at 756 (citation omitted).

There is substantial support for the NCUC's dismissal of dPi's complaint: The ICA states that "promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly." The NCUC heard unrebutted testimony that BellSouth's own end users would not have been entitled to the sorts of promotions for ***645** which dPi applied. Specifically, Ms. Tipton testified that BellSouth did not count 'blocks' as features, since "[i]t really doesn't make any sense for BellSouth to develop a promotion to entice customers to buy additional service when the enticement only applies to something that's already free."

While Ms. Tipton's testimony went unrebutted before the NCUC, dPi now seeks to undermine BellSouth's interpretation by attacking Ms. Tipton's testimony as lacking "personal knowledge of the situation." While Ms. Tipton stated that her testimony was based in "part" on what colleagues had told her, she also said she had reviewed all twenty-four months of promotion credit claims, and "undertaken [her] own evaluation." Ms. Tipton also added that she was "very familiar with" BellSouth's discount policy "prior to learning dPi's filing of any complaints." She remarked, "[t]hat's not something I had to learn." That is sufficient for the NCUC to admit Ms. Tipton's testimony and for us to consider it now.

****4** Next, dPi marshals various pieces of data to try to show BellSouth engaged in a practice of offering promotional discounts to other customers who purchased basic service and asked BellSouth to 'block' features. The NCUC duly considered Ms. Tipton's testimony that the data did not and could not explain the specific reasons why BellSouth had given waivers to individual customers in other regions. The NCUC also noted that "dPi, by its own admission, has done nothing more than review the data and compile a set of numbers .... [or] attempt to find even one order in which the LCCW waiver was granted to a customer that it contends was not eligible to receive the promotion and [BellSouth] contends is not." We cannot discern more meaningful inferences from this data, let alone substantial support for overturning the NCUC.

Finally, dPi argues that it qualified for the LCCW under the terms of the promotion itself. While the NCUC did not reach this issue, the face of the promotion and Tariff bolster the NCUC's decision. The LCCW refers to customers who purchase "two (2) custom calling (or TouchStar service) local features," and the Tariff explicitly defines TouchStar service to include twelve features. Nowhere does this definition refer to an ILEC's decision to 'block' certain charge-per-use features. Nor are we swayed by dPi's contentions that 'blocks' constitute features, even though they are free, because they have USOCs. The promotion refers to "purchase[d]" features—not the costless deactivation of charge-per-use features. Moreover, there are thousands of USOCs for BellSouth's functionalities, so merely having a USOC does not alone make something a 'feature.' The Tariff's passing reference to BCR and BCD as "features" in a footnote does not change matters, since that same sentence goes on to say 'blocks' "should not be included in the determination of applicable Multi–Feature Discount Plan [ ] discounts...."

III.

[2] Last, there is the question of whether the district court erred in denying dPi's Rule 60(b) motion. In that motion, dPi argued that it was entitled to relief from the earlier grant of summary judgment because new evidence allegedly showed that BellSouth had awarded LCCW credit to customers who placed or-

ders identical to dPi's. The district court denied this motion on April 16, 2009, concluding that dPi "failed to meet the threshold requirement of asserting a meritorious claim." Even assuming dPi had met that burden, the court found that the new evidence would not likely have led to a different outcome on the merits.

This Court reviews a district court's denial of a Rule 60(b) motion for abuse of ***646** discretion. *Aikens v. Ingram,* 612 F.3d 285, 290 (4th Cir.2010). Here, however, we need not conduct that analysis because dPi has abandoned its Rule 60(b) claim. dPi mentions the Rule 60(b) issue only once in its opening brief, in its statement of facts, *see* Appellant's Br. 21, and does not raise the issue at all in its reply brief. At no point does dPi offer any argument as to why the district court erred in denying its Rule 60(b) motion. Under Fourth Circuit precedent, dPi's failure to argue the issue amounts to a waiver. *See Edwards v. City of Goldsboro,* 178 F.3d 231, 241 n. 6 (4th Cir.1999) ("Failure to comply with the specific dictates of [Fed. R.App. P. 28(a)(9)(A)] with respect to a particular claim triggers abandonment of that claim on appeal").

IV.

****5** Accordingly, we affirm the district court's grant of summary judgment in favor of the NCUC and BellSouth.

AFFIRMED.

C.A.4 (N.C.),2011.
dPi Teleconnect LLC v. Owens
413 Fed.Appx. 641, 2011 WL 327071 (C.A.4 (N.C.))

END OF DOCUMENT

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina ("AT&T") and that she has caused AT&T South Carolina's Opposition to Halo's Motions to Strike Testimony of Mr. Neinast, Mr. McPhee, and Mr. Drause in Docket No. 2011-304-C to be served upon the following on April 11, 2012:

M. John Bowen, Jr.
Margaret M. Fox
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(South Carolina Telephone Coalition)
(Electronic Mail)

John J. Pringle, Jr.
Ellis, Lawhorne & Sims, P.A.
1501 Main Street, 5th Floor
Post Office Box 2285
Columbia, South Carolina 29202
(Halo Wireless, Incorporatd)
(Electronic Mail)

Troy P. Majoue
Steven H. Thomas
Jennifer M. Larson
McGuire, Craddock & Strother, P.C.
2501 N. Harwood
Suite 1800
Dallas, Texas 75201
(Halo Wireless, Incorporated)
(Electronic Mail)

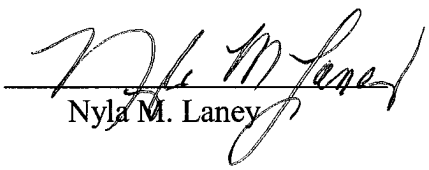
W. Scott McCollough
McCollough Henry, P.C.
1250 S. Capital of Texas Hwy., Bldg. 2-235
Westlake, Texas 78746
(Halo Wireless, Incorporated)
(Electronic Mail)

Nanette Edwards, Esquire
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, South Carolina 29201
(Electronic Mail)

F. David Butler, Esquire
Senior Counsel
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(Electronic Mail)

Joseph Melchers
Chief Counsel
S.C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(Electronic Mail)

Jocelyn G. Boyd, Esquire
Deputy Clerk
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(Electronic Mail)



Nyla M. Laney

926588